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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1423

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,
Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

Motion to Dismiss or Affirm

On Appeal from the Court of Appeal, Second Appellate District, State of California

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STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

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On Appeal from the Court of Appeal,
Second Appellate District, State of California

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Court to dismiss this appeal or to affirm the decision of the California Court of Appeal for the following reasons:

1. This case does not present a substantial federal question.
2. This Court has no jurisdiction to consider the constitutional validity of the California principal office deduction because decision on that issue was rendered unnecessary on the basis of an adequate and independent state ground.

INTRODUCTORY STATEMENT

This case involves the California tax provisions regarding insurance companies doing insurance business in California, including the California retaliatory tax for the years 1965 through 1971 (Cal. Const., art. XIII, former § 14-4/5, subd. f(3) and Cal. Ins. Code §§ 685-685.4) and the principal office deduction from the California gross premiums tax for the years 1967 through 1971 (Cal. Const., art. XIII, former § 14-4/5, subd. (e); former Cal. Rev. & Tax. Code § 12241).[1] The California retaliatory tax provisions can be summarized as providing that when a foreign state would impose a heavier tax burden upon a California insurer than California would normally impose upon a similar insurer from that foreign state, then California will instead impose the same tax burden on that state's insurer as would be imposed by that state upon the similar California insurer. This is what is known as a "comparative" retaliatory tax; all of the 49 states which have retaliatory insurance taxes have "comparative" statutes. See *infra* at p. 11 n. 9 and Appendix B hereto.

Before a 1964 amendment to the California constitutional provision, the California Constitution (but not the statute) had provided as an additional condition for the application of the retaliatory tax that the foreign state would actively discriminate by imposing upon the California insurer burdens exceeding those which it imposed upon its similar domestic insurer. The 1964 amendment to the California Constitution eliminated the internal discrimination condition without changing the "comparative" element of the retaliatory tax. *Franklin Life Ins. Co. v. State Board of*

1. See Appendix A for the text of the cited provisions.

Equalization (1965) 63 Cal. 2d 222, 227, 404 P.2d 477, 481; *Atlantic Ins. Co. v. State Board of Equalization* (1967) 255 Cal.App.2d 1, 10, 62 Cal. Rptr. 784, 790 (hearing denied, Cal. Sup. Ct.); *Western & Southern Life Ins. Co. v. State Bd. of Equalization* (1970) 4 Cal. App.3d 21, 33, 84 Cal. Rptr. 88, 96 (hearing denied, Cal. Sup. Ct.).

In making the comparison required by the retaliatory provisions, California will transfer the California facts pertaining to the foreign insurer being taxed by California to a hypothetical California insurer in that foreign insurer's home state. Thus in determining appellant Western and Southern Life Insurance Company's (hereinafter "Western and Southern") retaliatory tax liabilities for each year in the case at bar, appellee State Board of Equalization (hereinafter "the Board") first determined the insurance premiums taxes and fees which Ohio (Western and Southern's home state) would have imposed on a similar California insurer transacting the same kind and amount of insurance business in Ohio that Western and Southern actually transacted in California. Since the resulting Ohio figures were greater than the premiums taxes and fees owed by Western and Southern to California, the difference between those amounts was imposed as the California retaliatory tax under the terms of Insurance Code section 685 and California Constitution, article XIII, section 14-4/5, subdivision (f)(3) as amended in 1964.

California also imposes a gross premiums tax upon all insurers doing business in California; this is a privilege tax measured by the amount of gross premiums, less return premiums, received during the year by the insurer from its California business. During the years at issue said tax had a principal office deduction whereby an insurer could deduct from the premiums tax otherwise due the amount of certain real estate taxes which it had paid during the year

upon real property containing its California principal office. Cal. Const., art. XIII, former § 14-4/5, subd.(e) as amended in 1966; Cal. Rev. & Tax Code § 12241 as amended in 1967.[2] Western and Southern has challenged the constitutional validity of the principal office deduction for the years in issue on the basis of a distinction made therein between some California insurers and other insurers.

In the decision which is on appeal[3] the California Court of Appeal held that the California comparative retaliatory tax is constitutionally valid. Jurisdictional Statement (hereinafter "J. S.") Appendix 30a-33a. It further held that it did not need to reach the federal constitutional issues regarding the principal office deduction, for under California law the gross premiums tax and the retaliatory tax "are but parts of a single taxation scheme," wherein no tax refund is due unless the taxpayer has paid more than the total scheme required. J. S. App. 34a, 36a. Since the burden which Ohio would impose upon a similar California insurer would be greater than California's nonretaliatory tax burden on Western and Southern, any gross premiums tax reduction Western and Southern might gain on its principal office deduction issue would be offset automatically under California law by an increase in its retaliatory tax liabilities. *Id.* Because of this result under California law the Court of Appeal did not decide the principal office deduction issues raised by Western and Southern.

On December 27, 1979, the California Supreme Court denied Western and Southern's request for hearing in this case. J. S. App. 36a.

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2. See Appendix A for the text of the cited provisions. The entire principal office deduction was repealed in 1976.

3. The Court of Appeal's decision is reported at 99 Cal.App.3d 410 (as modified), 159 Cal. Rptr. 539 (not as modified); references herein are to Appendix A of the Jurisdictional Statement.

QUESTIONS PRESENTED

1. Is there a substantial federal question of whether the California comparative retaliatory insurance tax, which was enacted to secure uniformity and reciprocity among the states and which separately classifies each insurer by imposing upon said insurer the same higher tax burden as that insurer's home state would impose upon a similar California insurer, violates the commerce clause or the equal protection or due process guarantees of the United States Constitution?

2. Does the California holding that under California law the gross premiums tax and the retaliatory tax are but interrelated parts of a single insurance taxation scheme, and that any increase to Western and Southern's gross premiums tax principal office deduction would automatically be balanced by an increase in its retaliatory tax liability, provide an adequate state ground which prevents this Court from having jurisdiction to consider Western and Southern's challenge of the validity of the gross premiums tax principal office deduction?

ARGUMENT

1. In Prudential Insurance Co. v. Hobbs This Court Upheld a Kansas Comparative Retaliatory Tax Which the California Courts Have Correctly Recognized As Being "Substantially Identical" to the California Comparative Tax Challenged Herein.

Western and Southern is clearly wrong in its claim, made in the face of *Prudential Insurance Co. v. Hobbs* (1946) 328 U.S. 822, that this Court "has never considered the validity of comparative retaliatory taxes." J.S. 15. The comparative retaliatory tax which was in issue in *Prudential Insurance Co. v. Hobbs* has previously been recognized as being "substantially identical to [California] Insurance Code section 685" (*Atlantic Ins. Co. v. State Board of*

Equalization (1967) 255 Cal.App.2d 1, 10, 62 Cal. Rptr. 784, 790), which is the precise statutory provision which has been applied (under the consistent California constitutional provision as amended in 1964) in the present case.

Hobbs involved several Kansas insurance taxes; one of the taxes involved was the Kansas retaliatory tax which was a purely "comparative" tax in that it required as a condition for its application that the foreign state impose a higher basic tax burden on Kansas insurers than Kansas imposed on that state's insurers, but it did not require that the other state have any internal domestic/foreign discrimination within its own laws to trigger the application of the Kansas retaliatory tax.[4]

Thus *Hobbs* did involve a state retaliatory insurance tax provision "substantially identical" to the California retaliatory tax as it exists at the present time and which the California Court of Appeal, citing *Hobbs* (J.S. 31a, 36a), has found to be constitutional. The Kansas Supreme Court in *Hobbs* found this retaliatory tax (and the other Kansas insurance taxes) to not be in violation of the commerce clause of the United States Constitution. *In re Insurance Tax Cases* (1945) 160 Kan. 300, 161 P.2d 726, 730, 735. This United States Supreme Court affirmed that holding in a *per curiam* decision, citing *Prudential Insurance Co. v. Benjamin* (1946) 328 U.S. 408. *Prudential Insurance Co. v. Hobbs* (1946) 328 U.S. 822. The *Benjamin* case considered the McCarran Act's provision (59 Stats. 33, 34

4. ". . . G.S. 1935, 40-253 provides that when the laws of a state under which the insurance company was incorporated require the payment of greater taxes, etc. from insurance companies of other states than is required by the existing laws of this state, then such companies shall pay the taxes, etc. which would be required by a company organized in this state in order to do business in such other state." *In re Insurance Tax Cases* (1945) 160 Kan. 300, 161 P.2d 726, 730, *aff'd. per curiam sub nom. Prudential Insurance Co. v. Hobbs* (1946) 328 U.S. 822.

(§ 2(a)), 15 U.S.C. § 1012) that "the business of insurance . . . shall be subject to the laws of the several states which relate to the regulation or taxation of such business"; this Court concluded that Congress had "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done" (328 U.S. 408, 431) and held that Congress had the power to release all state taxation of insurance business from commerce clause restraints. *Id.* at 427, 433-36.[5]

Appellant Western and Southern hopes to convince this Court to join the trial court (see J.S. 14-15) in the erroneous view that *Hobbs* did not involve a comparative retaliatory tax similar to the one at issue in this case. But appellant's error is transparent: on page 5 of the Jurisdictional Statement Western and Southern states that a retaliatory tax is an "anti-discrimination retaliatory tax" if it is conditioned upon the foreign state actually discriminating in its laws in favor of its domestic insurers and against all others; on page 13 of the Jurisdictional Statement Western and Southern flatly states that *Hobbs* "involved not a *comparative* retaliatory tax but an *anti-discrimination* retaliatory tax" without citing any part of the Kansas statute which stated any condition that would have brought the statute within the category fashioned by Western and Southern itself. As shown above, the Kansas statute included no such condition; it was purely a comparative retaliatory insurance tax statute which Kansas found to be not discriminatory and

5. The subsequent decisions of this Court which are cited in the first incomplete paragraph on page 16 of the Jurisdictional Statement have no bearing on this case. They relate to the question of the scope of the meaning of the term "insurance business" as used in the McCurran Act; they do not affect in the slightest the Act's release from commerce clause restraints for state taxation of what is clearly insurance business.

which this Court upheld *per curiam* in *Prudential Insurance Co. v. Hobbs* (1946) 328 U.S. 822.

II. Other Case Authority Fully Supports the Validity of the Comparative Retaliatory Tax.

The California Supreme Court has earlier held, under the decision of this United States Supreme Court in *Prudential Insurance Co. v. Benjamin* (1946) 328 U.S. 408, that retaliatory insurance tax statutes cannot be challenged on the ground of violation of the commerce clause of the United States Constitution. *Franklin Life Ins. Co. v. State Board of Equalization* (1965) 63 Cal.2d 222, 225 n. 2, 404 P.2d 477, 480 n. 2. This holding results from the federal McCarran Act (15 U.S.C. §§ 1011-1015) which, as the *Benjamin* case established, removed all commerce clause restrictions from the transaction of interstate insurance business. *Id.; also see Atlantic Ins. Co. v. State Board of Equalization* (1967) 255 Cal.App.2d 1, 11-12, 62 Cal. Rptr. 784, 791.[6]

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6. The trial court in the present case quoted a statement from the *Atlantic* decision out of context in such a manner as to imply that *Atlantic* had concluded that a purely comparative retaliatory tax would violate federal constitutional guarantees. Western and Southern has quoted the trial court's misleading discussion on page 15 of the Jurisdictional Statement. When the *Atlantic* statement is placed in context, it is clear that the California Court of Appeal was speaking of the violation of the pre-1964 California Constitution which would have occurred if the purely comparative California statute had been applied in instances where there was no satisfaction of the additional condition of foreign-state discrimination which was required by the pre-1964 retaliatory tax provision of the California Constitution. *Atlantic Ins. Co. v. State Bd. of Equalization* (1967) 255 Cal.App.2d 1, 5-6, 62 Cal. Rptr. 784, 787. In 1970 the California Court of Appeal, citing *Atlantic* as support, concluded (in what technically was dicta) that the very insurer involved in this case would not suffer infringement of its federal constitutional rights under the purely comparative retaliatory provisions of the post-1964 California Constitution. *Western & Southern Life Ins. Co. v. State Bd. of Equalization* (1970) 4 Cal.App.3d 21, 30, 84 Cal. Rptr. 88, 94.

The McCarran Act did not and could not dispense with the due process and equal protection rights of insurers; the California *Franklin* decision also dealt with these constitutional guarantees. In addition to its commerce clause holding, the *Franklin* opinion also holds that California law does not violate said federal due process and equal protection guarantees when it distinguishes between tax treatment of non-California insurers on the basis of whether their home states would apply a heavier tax burden upon a similar California company doing business there. 63 Cal.2d at 232-33, 404 P.2d at 484-85.

Although for the pre-1964 period involved in *Franklin* the California retaliatory tax was conditioned on discrimination by the other state in addition to the standard comparative test, in *Franklin* the taxpayer's equal protection argument was based solely on the effect of application of the "comparative" element that compares the result under California law with the result under the other state's law. The taxpayer argued in *Franklin* that it was deprived of equal protection because large Illinois insurers would not have to pay any California retaliatory taxes while small Illinois insurers with similar California principal offices, such as Franklin Life, would.[7] Thus the California Supreme

7. Illinois Insurance Code section 409 (Smith-Hurd Ill. Ann. Stat., ch. 73, § 1021) levies, and at the time of the *Franklin* facts levied, upon all non-Illinois insurers a privilege tax measured by 2 percent of premiums. This tax did not apply to Illinois insurance companies, and there was no distinction in Illinois law between the methods of taxing large and small insurers. Although the California gross premiums tax rate was more than that of the Illinois tax, application of the California principal office deduction to the small Illinois insurer in *Franklin* resulted in the basic California burden on that insurer being less than the burden which the Illinois statute would impose upon a similar California insurer. 63 Cal.2d at 231-32, 404 P.2d at 484-85. Thus the California retaliatory tax applied in *Franklin*. A large Illinois insurer with more gross premiums but with the same size principal office deduction could have a total

Court in *Franklin,* applying the "rational basis" standard set by this Court in *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, 509, necessarily concluded as a part of its holding that it was reasonable under the federal due process and equal protection standards for California to distinguish in its tax treatment of non-California insurance companies on the basis of whether their home state would have applied a heavier tax burden upon a similar California company doing business there. *Id.* at 232-33, 404 P.2d at 485. Due to the California principal office deduction, in *Franklin* that classification rendered different results as between large and small insurance companies from the same state with principal offices in California; that classification test also renders different results as between insurance companies from different states, depending on the individual characteristics of the insurer involved and the tax burdens which its home state would impose upon a similar California insurer.

As pointed out by the California Court of Appeal (J. S. App. 30a), the purpose of retaliatory taxes is to put pressure on the several states to impose the same tax burden on all insurance companies and thereby encourage the doing of interstate business. As phrased in the *Atlantic* case, 255 Cal.App.2d at 15, 62 Cal. Rptr. at 793, retaliatory insurance tax laws are enacted to "secure reciprocity" and "to achieve uniformity of treatment and not to discriminate." As shown by the *Franklin* decision, *supra,* comparative retaliatory tests do not classify all out-of-state insurers together and impose greater burdens upon such insurers

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California tax burden equal to or greater than the burden Illinois would impose upon a similar California insurer, with the result that such an insurer would not be subject to the California retaliatory tax.

as a group;[8] rather, each such comparative statute separately classifies each insurer by the way that insurer's home state would treat a similar insurer from the state having the comparative retaliatory statute. Comparative retaliatory provisions of other states[9] have been upheld as utilizing a reasonable basis of classification. *See Phoenix Ins. Co. v. Welch* (1883) 29 Kan. 672, 32 Pac. States Rep. 480, 482, 484-85; *Commonwealth v. Fireman's Fund Ins. Co.* (1952) 369 Pa. 560, 87 A.2d 255, 258; *Baldwin v. Insurance Co. North America* (1888) 115 Ind. 257, 17 N.E. 574, 579.

III. The California Courts Have Determined Solely on the Basis of California Law That, Given the Validity, Application and Function of the Retaliatory Tax As One Part of a Consolidated Scheme of California Insurance Taxation, It Is Unnecessary to Decide Western and Southern's Challenge of the Validity of the Gross Premiums Tax Principal Office Deduction; This Is an Adequate State Ground That Results in There Being No Jurisdiction in This Court to Decide the Federal Issue Which Was Not Reached by the California Decision.

On pages 5, 6-7 and 12 of the Jurisdictional Statement, Western and Southern touches upon the issue involving the 1966 amendment to the principal office deduction provided (until the deduction's 1976 repeal) for the California gross premiums tax. As the Court of Appeal has held in the instant case (J.S. App. 33a-34a, 36a), once the constitutional

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8. This is one of the aspects of this case which distinguish it from cases such as *Wheeling Steel Corporation v. Glander* (1949) 337 U.S. 562, *Reserve Life Insurance Co. v. Bowers* (1965) 380 U.S. 258 (per curiam), and *WHYY v. Glassboro* (1968) 393 U.S. 117 (per curiam), cited by Western and Southern on pages 16 and 17 of the Jurisdictional Statement.

9. Forty-nine of the fifty states currently have insurance retaliatory taxes; *all* of those taxes are of the purely "comparative" type such as the Kansas statute involved in *Hobbs* and the California provisions involved in the case at issue. See Appendix B for a listing of said retaliatory tax statutes.

validity of the California retaliatory tax has been established, there is no need to determine the constitutional validity of the 1966 principal office deduction amendment on the merits, for the holding that the retaliatory tax is valid fully determines that Western and Southern is not entitled to any judgment on its suit for tax refund: any lowering of Western and Southern's California premiums tax liabilities for each year would result under California law in an identical increase in the retaliatory tax amount, so that Western and Southern's liabilities under the two taxes would still total the same as the total insurance tax liability an identical California insurer would incur in Ohio, Western and Southern's home state.[10] This outcome under the retaliatory tax results from the fact that Ohio imposed or would have imposed a greater tax burden on a similar California insurer than California imposed on Western and Southern for the years involved.

The California holding in this case, that as a matter of California law the retaliatory tax and the gross premiums tax "are but parts of a single taxation scheme" wherein no refund is due unless the taxpayer has paid more than the entire scheme required (J.S. App. 34a, 36a), is a construction of the California statutes and constitutional provisions which is binding upon this Court. *See Hebert v. Louisiana* (1926) 272 U.S. 312, 316. Furthermore, the California resolution of the principal office deduction issue on this basis constitutes an adequate state ground independent of the federal issue, not decided by the Court of Appeal, of whether the post-1966 principal office deduction to the Cali-

10. Although Western and Southern relies heavily upon the trial court's opinions in other respects, appellant fails to mention that the trial court reached the same conclusion in the minute order it issued with its memorandum of intended decision. J.S. App. 2a.

fornia gross premiums tax taken by itself would have violated the constitutional rights of a foreign insurer. Given the presence of such an adequate independent state ground in the case at bar, this Court has no jurisdiction in this case over the issue of the constitutional validity of the post-1966 principal office deduction. *Herb v. Pitcairn* (1945) 324 U.S. 117, 123-24, 125-26.

Even if there were not an adequate state ground resolving the principal office deduction issue, Western and Southern would not be entitled to any relief. The gross premiums tax is a privilege tax, not a property tax. *Carpenter v. Peoples Mutual Life Ins. Co.* (1937) 10 Cal.2d 299, 74 P.2d 508. This Court has made it clear that, absent the special facts of *Southern Railway Co. v. Greene* (1910) 216 U.S. 400 (corporation with immense investments in property irretrievably devoted to a limited and monopolistic use), a state may constitutionally impose new *privilege* tax burdens on foreign corporations already doing business in the state without imposing equivalent burdens on domestic corporations. *Cheney Brothers Co. v. Massachusetts* (1918) 246 U.S. 147, 156-57; *Baltic Mining Co. v. Massachusetts* (1913) 231 U.S. 68, 87-88; *Northwestern Life Ins. Co. v. Wisconsin* (1918) 247 U.S. 132, 139-40; *Hanover Ins. Co. v. Harding* (1926) 272 U.S. 494, 510-12, 514-15.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court should dismiss the appeal or, in the alternative, affirm the decision of the California Court of Appeal.

DATED: April 9, 1980

Respectfully submitted,

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(Appendices Follow)

Appendix A

Article XIII, section 14-4/5, subdivision (f)(3), as amended in 1964 and as it was in effect for the years 1965 through 1971, provided as follows:

> (3) When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines, penalties, deposit requirements or other material obligations, prohibitions or restrictions are or would be imposed upon California insurers, or upon the agents or representatives of such insurers, which are in excess of such taxes, licenses and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements or other obligations, prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this state; so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses and other fees, in the aggregate, or fines, penalties or deposit requirements or other material obligations, prohibitions, or restrictions, of whatever kind shall be imposed upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in California. Any tax, license or other fee or other obligation imposed by any city, county, or other political subdivision or agency of such other state or country on California insurers or their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this paragraph (3) of subdivision (f).
>
> The provisions of this paragraph (3) of subdivision (f) shall not apply as to personal income taxes, nor as

to ad valorem taxes on real or personal property nor as to special purpose obligations or assessments heretofore imposed by another state or foreign country in connection with particular kinds of insurance, other than property insurance; except that deductions, from premium taxes or other taxes otherwise payable, allowed on account of real estate or personal property taxes paid shall be taken into consideration in determining the propriety and extent of retaliatory action under this paragraph (3) of subdivision (f).

For the purposes of this paragraph (3) of subdivision (f) the domicile of an alien insurer, other than insurers formed under the laws of Canada, shall be that state in which is located its principal place of business in the United States.

In the case of an insurer formed under the laws of Canada or a province thereof, its domicile shall be deemed to be that province in which its head office is situated.

The provisions of this paragraph (3) of subdivision (f) shall also be applicable to reciprocals or interinsurance exchanges and fraternal benefit societies.

California Insurance Code section 685 through 685.4, as enacted in 1959, and as they have existed without change ever since, provide as follows:

§ 685.

When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines, penalties, deposit requirements or other material obligations, prohibitions or restrictions are or would be imposed upon California insurers, or upon the agents or representatives

of such insurers, which are in excess of such taxes, licenses and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements or other obligations, prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this State, so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses and other fees, in the aggregate, or fines, penalties or deposit requirements or other material obligations, prohibitions, or restrictions, of whatever kind shall be imposed upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in California. Any tax, license or other fee or other obligation imposed by any city, county, or other political subdivision or agency of such other state or country on California insurers or their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this article.

§ 685.1.

This article shall not apply as to personal income taxes, nor as to ad valorem taxes on real or personal property nor as to special purpose obligations or assessments heretofore imposed by another state or foreign country in connection with particular kinds of insurance, other than property insurance; except that deductions, from premium taxes or other taxes otherwise payable, allowed on account of real estate or personal property taxes paid shall be taken into consideration in determining the propriety and extent of retaliatory action under this article.

§ 685.2.

For the purposes of this article the domicile of an alien insurer, other than insurers formed under the laws of Canada, shall be that state in which is located its principal place of business in the United States.

In the case of an insurer formed under the laws of Canada or a province thereof, its domicile shall be deemed to be that province in which its head office is situated.

§ 685.3.

To the extent permitted by the Constitution of this State there is hereby imposed upon the commissioner the duty of enforcing the execution of the provisions of Section 685. It shall be the duty of the commissioner to initiate the enforcement and execution of the provisions of Section 685 in request to all matters which by the Constitution or laws of this State require further or final action by other officials of this State. In respect to any matter initiated by the commissioner, it shall be the duty of the Board of Equalization, Board of Control and State Controller to complete the enforcement and execution of the provisions of Section 685 in respect to such matter within the scope of the duties and powers of each as set forth in the Constitution and laws of this State.

§ 685.4.

The provisions of this article shall also be applicable to reciprocals or interinsurance exchanges and fraternal benefit societies.

Article XIII, section 14-4/5, subdivision (e), as amended in 1964 and as it was in effect for the years 1967 through 1971, provided as follows:

(e) (1) Each insurer shall have the right to deduct from the annual tax imposed by this section upon such insurer in respect to a particular year the amount of real estate taxes paid by it, in that year, before, or within 30 days after, becoming delinquent, on real property owned by it at the time of payment, and in which was located, in that year, its home office or principal office in this state. Such real property may consist of one building or of two or more adjacent buildings in which such an office is located, the land on which they stand, and so much of the adjacent land as may be required for the convenient use and occupation thereof.

(2) In the event a portion of the real property described in paragraph (1) of this subdivision is occupied by a person or persons other than the insurer the deduction granted the insurer by said paragraph shall be limited to that percentage, not to exceed 100 percent, equal to the sum of (i) the percentage of occupancy of the insurer obtained by deducting from 100 percent the ratio that the square footage of said building or buildings occupied by the person or persons other than the insurer bears to the total square footage of said building or buildings plus (ii) the lesser of one-half of said percent of occupancy of the insurer or 25 percent, provided, however, that the limitation set forth in this paragraph shall not be applicable to such real property occupied by a domestic insurer as its home office or principal office in this state on January 1, 1970, or to such real property upon which construction of the home office or principal office of the domestic insurer commenced prior to January 1, 1970. As used in this paragraph, "domestic insurer" means an in-

surer organized under the laws of this state and licensed to transact insurance in this state on or before December 31, 1966.

(3) The phrase "person or persons other than the insurer" as used in paragraph (2) of this subdivision shall not include (i) another insurance company or association affiliated directly or indirectly with the insurer through direct ownership or common ownership or control; or (ii) the corporate or other manager of the insurer to the extent of its insurance management activities. The Legislature may define the terms used in this paragraph for the sole purpose of facilitating the operation of this paragraph.

California Revenue and Taxation Code section 12241, as amended in 1967 and as it was in effect for the years 1967 through 1971, provided as follows:

§ 12241.

(a) Each insurer shall have the right to deduct from the tax imposed by this chapter upon an insurer in respect to a particular year the amount of real estate taxes paid by it, in that year, before, or within 30 days after, becoming delinquent, on real property owned by it at the time of payment, and in which was located, in that year, its home office or principal office in this state. Such real property may consist of one building or of two or more adjacent buildings in which such an office is located, the land on which they stand, and so much of the adjacent land as may be required for the convenient use and occupation thereof.

(b) In the event a portion of the real property de scribed in subdivision (a) is occupied by a person or persons other than the insurer the deduction granted

the insurer by said subdivision shall be limited to that percentage not to exceed 100 percent, equal to the sum of (i) the percentage of occupancy of the insurer obtained by deducting from 100 percent the ratio that the square footage of said building or buildings occupied by the person or persons other than the insurer bears to the total square footage of said building or buildings plus (ii) the lesser of one-half of said percent of occupancy of the insurer or 25 percent, provided, however, that the limitation set forth in this paragraph shall not be applicable to such real property occupied by a domestic insurer as its home office or principal office in this state on January 1, 1970, or to such real property upon which construction of the home office or principal office of the domestic insurer commenced prior to January 1, 1970. As used in this section, "domestic insurer" means an insurer organized under the laws of this state and licensed to transact insurance in this state on or before December 31, 1966.

(c) The phrase "person or persons other than the insurer" as used in subdivision (b) of this section shall not include (i) another insurance company or association affiliated directly or indirectly with the insurer through direct ownership or common ownership or control; or (ii) the corporate or other manager of the insurer to the extent of its insurance management activities.

Appendix B

The following are all the state statutes which impose a retaliatory tax; all 49 are "comparative" retaliatory statutes:

Code of Ala. 1975 § 27-3-29 (1977); Alaska Stat. § 21.09.270 (1966); Ariz. Rev. Stat. § 20-230 (1977); Ark. Stat. § 66-2225 (1961); Cal. Ins. Code §§ 685-685.4 (1959); Colo. Rev. Stat. 1973 § 10-3-209(2) (1973); Conn. Gen. Stat. § 12-211 (1965); Del. Code Ann. tit. 18, § 531 (1953); Fla. Stat. Ann. § 624.429 (1969); Ga. Code Ann. § 56-321 (1960); Idaho Code § 41-340 (1961); Ill. Ins. Code § 444 (Smith Hurd Ill. Ann. Stat. ch. 73, § 1056) (1941); Indiana Code § 27-1-20-12 (1937); Iowa Code Ann. § 505.14 (1955); Kan. Stat. Ann. § 40-253 (1967); Ky. Rev. Stat. Ann. § 304.3-270 (1970); La. Rev. Stat. § 22:1079 (1970); Me. Rev. Stat. Ann. § 24-A-428 (1973); Md. Ann. Code art. 48A, § 61 (1971); Mass. Ann. Laws ch. 175, § 159 (1922); Mich. Stat. Ann. § 24.1476 (1948); Minn. Stats. Ann. § 60A.19, subd. 6 (1971); Miss. Code §§ 27-15-121 through 27-15-127 (1964); Mo. Ann. Stat. § 375.916 (1967); Mont. Rev. Code § 40-2826 (1959); Neb. Rev. Stat. § 44-150 (1959); Nev. Rev. Stat. § 68A.330 (1971); N. H. Rev. Stat. § 400-A:35 (1971); N.J. Stat. Ann. § 17:32-15 (1950), § 17B:23-5 (1971); N.M. Stat. § 58-5-27 (1951) (insurance brokers), § 58-5-49 (1951) (insurance agents); N.Y. Ins. Law § 61 (1973); N.C. Gen. Stat. § 58-152 (1945); N.D. Century Code § 26-01-05 (1943); Ohio Rev. Code Ann. § 3905.41 (1953), § 5729.06 (1953); Okla. Stat. Ann. tit. 36, § 628 (1957); Ore. Rev. Stat. § 731.854 (1967); 40 Pa. Cons. Stat. Ann. § 50 (1974); R.I. Gen. Laws § 27-2-17 (1956); Code of Laws of S.C. § 37-132 (1972); S.D. Cod. Laws § 58-6-70 (1978);

Tenn. Code Ann. § 56-241 (1955); Vernon's Ann. Texas Stat., Ins. Code art. 21.46 (1957); Utah. Code Ann. 31-14-19 (1963); Vt. Stat. Ann. tit. 8, § 3367 (1967); Va. Code § 38.1-87 (1952); Wash. Rev. Code Ann. § 48.14.040 (1947); W. Va. Code Ann. § 33-3-16 (1957); Wis. Stat. Ann. § 76.35 (1921), § 76.36 (1975); Wyo. Stat. § 26.1-77 (1967).

The years given with the above citations show the date of enactment or date of most recent amendment or reenactment.